Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GILBERT EMAN,

Petitioner

v.

ERICH H. HOLDER Jr.,
United States Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' (BIA) determination that the petitioner failed to establish "changed circumstances" to excuse the untimely filing of his asylum application.

2. Whether or not the Court of Appeals erred in not granting petitioner's application for asylum when the latter has met the standard of well founded fear of persecution.

CORPORATE DISCLOSURE STATEMENT

None of the parties are corporations. Sup. Ct. R. 29.6.

TABLE OF CONTENTS

Question Presented i

Corporate Disclosure ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Decision Below 1

Jurisdiction 1

Statutes and Regulations Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

1. The writ should be granted in order to correct the erroneous ruling of the 4th Circuit that the US Court of Appeals is without jurisdiction to review the BIA's determination that the asylum applicant has failed to show changed circumstances to excuse the untimely filing of an application for asylum which ruling directly conflicts with the decision of the 9th Circuit in Ramadan v. Gonzales, 479 F.3d 646, (9th Cir. 2007) that the Court of Appeals has jurisdiction to review the same where mixed questions of fact and law is involved. The conflicting decisions warrant the review of this Court 6

2. The failure of the BIA to grant the asylum application of petitioner despite the latter having satisfied the standard of well founded fear of persecution calls for the exercise of this Court's supervisory power 9

Conclusion 12

Appendix 1a

TABLE OF AUTHORITIES

Cases

Almuhtaseb v. Gonzales, 453 F.3d 743
(6th Cir 2006). 8

Hoxha v. Ashcroft, 319 F.3d 1179
(9th Cir. 2003). 11

Knezevic v. Ashcroft, 367 F.3d 1206
(9th Cir. 2004). 11

Matter of Mogharrabi, 19 I&N Dec. 439
(BIA 1987). 11

Ramadan v. Gonzales, 479 F.3d 646,
(9th Cir. 2007). 8, 9

Sael v. Ashcroft, 386 F.3d 922
(9th Cir. 2004). 9,10

Statutes

INA § 208 (a)(2)(B) 6

INA § 208 (a)(2)(D) 6

INA § 208 (a)(3) 7

28 USC § 1254(1) 1

Other Authorities

8 CFR § 208.4(a)(4) 7

8 CFR § 203.13(b)(2)(iii) 11

PETITION FOR A WRIT OF CERTIORARI

Gilbert Eman ("petitioner") prays that this Court reviews on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, (the "US Court of Appeals") which dismissed petitioner's Petition for Rehearing and also dismissed in part and denied in part the appeal of the petitioner from the judgment of the Board of Immigration Appeals ("BIA") which affirmed the decision of the Immigration Court (IC).

DECISION BELOW

The unpublished per curiam opinion of the United States Court of Appeals dismissing the Petition for Review is set forth in the Appendix at 1a to 2a, and its Order denying the Petition for Rehearing at Appendix 3a.

JURISDICTION

The judgment of the United States Court of Appeals dismissing the Petition for Review of petitioner was entered on August 12, 2008; and its Order denying the Petition for Rehearing was entered on January 20, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of the following laws and regulations are set forth at Appendix 4a to 7a:

1. Section 208(a) of the Immigration and Nationality Act (INA) [8 USC§1158(a)];

2. INA § 242(a)(2)(D) [8 U.S.C. 1252(a)(2)(D)];

3. Title 8 Section 208.4(a)(4)of the Code of Federal Regulations (CFR); and

4. 8 CFR § 208.13(b)(2)(iii).

STATEMENT OF THE CASE

Petitioner is a citizen and national of Indonesia. He was born a Christian and continues to identify himself as a Christian. He is actively involved in his Christian church.

In Indonesia, petitioner was a member of an inter-denominational Christian ministry called Ecclesia. When he came to the United States to study in 1992, he joined the ICFC, an Indonesian Christian Church in Washington, D.C. In 2001, he moved to the Indonesian Pentecostal Church (GPdI) – "El Shaddai" – with which he was already familiar in Indonesia. El Shaddai has a church at 2504 Enalls Ave., Wheaton, MD20902 with Pastor Charles Tulenan as the senior pastor.

Petitioner's parents and sister are also Christians back in Indonesia. They attend church regularly despite the scarcity of Christian churches there due to the license requirements, the length of time the government processes these, and the Moslems extremists who have closed churches down.

Petitioner was persecuted in Indonesia because of his being a Christian. He narrated an attempted attack on him once when he was stopped on his way home and these people asked money from him. When they asked for his ID, he took off because he knew that something was going to happen to him once they see he is a Christian.

He testified about what happened to a friend who was mistreated and how Christians who are the minority do not get protection from the Government unlike the Moslem majority. He told of his Pastor Dominick who was stopped after church and then imprisoned; of his senior pastor Charles Tulenan and his followers whose church was burned and who were forced to evacuate Ternate, Maluku when Moslems attacked them.

Petitioner who had been studying in the U.S. on a valid F-1 visa since June 1992, was last admitted to the United States on or about December 10, 2000 on an F-1 visa to attend Strayer University in Washington, D.C. Between 1992 and 2000, he shuttled back and forth to Indonesia for a few times to visit his family. He noted (in his I-589 Asylum Application and personal statement) that tensions between Muslims and Christians in Indonesia began to escalate in 1997/1998 with the growth of Muslim extremists and random bombings of Christian churches in Indonesia.

Although he was attending school in the U.S., petitioner was constantly aware of the situation in Indonesia through family, friends and the media. Additionally, Pastor Charles Tulenan who was granted asylum in the U.S and became the Senior Pastor of the El Shaddai Church in Wheaton, MD where petitioner belonged, shared his story about how he, his family and close to 800 congregants were attached by Moslems and had to flee for their lives.

The situation grew progressively worse for Christians in Indonesia over the following years, climaxing in the period between October 2002 and August 2003 when Muslim extremists perpetrated the infamous Bali and Marriot Hotel bombings. Around 200 people were killed and 300 wounded

in the Bali bombing; and about 13 people were killed and 150 wounded in the Marriot Hotel bombing.

These bombings represented the "tipping point" for petitioner who felt after these bombings and in the wake of the 9/11 terrorist attacks on the Word Trade Center, that the circumstances in his country had so significantly changed that he could not return without being persecuted on account of his religious beliefs and active membership in the Indonesian Christian Church.

The 2005 US Department of State Country Report on Human Rights Practices in Indonesia (DOS 2005 Report) shows that Muslim extremists and terrorists continue to attack non-Muslim religious believers and restrict religious freedom. The Indonesian government is unable or unwilling to effectively punish the perpetrators and, in fact, limits freedom of religious expression and punishes religious expression of non-Muslims. According to the 2005 DOS Report: "On September 1, a court sentenced three women to three years in prison each for proselytizing based on their inclusion of Muslim children albeit with parental permission in Christian Sunday school activities" (pp. 14); and, "Courts sentenced several persons to jail for insulting Islam" (pp. 15).

On April 10, 2003, Petitioner reported to the US Immigration and Customs Enforcement (ICE) for SAR registration. Shortly thereafter, he received a Notice To Appear (NTA) before the Immigration Judge (IJ) in Baltimore, MD.

On October 29, 2003, petitioner filed his first I-589 application with the Immigration Court (IC). IJ Barrett terminating proceedings on February 17, 2004.

A new NTA was issued against petitioner on May 4, 2004 and IJ Dornell accepted petitioner's previously submitted I-589 application where petitioner sought the relief of Asylum, Withholding of Removal, and protection under the Convention Against Torture (CAT), or, in the alternative, voluntary departure.

In its Decision dated April 4, 2006, the IJ denied all the applications except voluntary departure.

Petitioner timely appealed the IC decision to the Board of Immigration Appeals (BIA) which, in its Order of November 6, 2007, affirmed the IJ decision and gave petitioner 60 days to voluntarily depart from the United States.

Petitioner filed on December 3, 2007, a Petition for Review with the US Court of Appeals 4th Circuit from the BIA's November 6, 2007 decision and filed a motion to stay pending appeal, his removal and the period of voluntary departure granted to him by the BIA. The motion was granted by the US Court of Appeals in its Order dated January 16, 2008. However, the Petition for Review was subsequently dismissed in part and denied in part in the Court's August 12, 2008 Judgment.

On September 25, 2008, petitioner filed a Petition for Rehearing which the US Court of Appeals also denied on January 20, 2009. Hence, this petition.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted in order to correct the erroneous ruling of the 4th Circuit that the US Court of Appeals is without jurisdiction to review the BIA's determination that the petitioner's asylum application was untimely filed which ruling directly conflicts with the decision of the 9th Circuit in Ramadan v. Gonzales, 479 F.3d 646, (9th Cir. 2007) that the Court of Appeals has jurisdiction to review the same where mixed questions of fact and law is involved. The conflicting decisions warrant the review of this Court.--

Petitioner was admitted to the U.S on an F-1 student on or about December 10, 2000 as a student of Strayer University. He filed his I-589 Asylum Application on October 29, 2003.

Though filed more than a year from his 2000 entry, petitioner's case comes within the "changed circumstances" exception to the one-year filing requirement because he established the existence of changed circumstances in his home country.

INA § 208 (a)(2)(B) provides that an asylum application must be filed within 1 year after the date of the alien's arrival in the United States. INA §208 (a)(2)(D) carves out an exception: if the alien demonstrates either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application.

"Changed circumstances" is defined in 8 CFR §208.4(a)(4) as including changes in conditions in the applicant's country of nationality.

Petitioner cited the progressive escalation in violence directed against Christians living in all parts of Indonesia as the changes in the conditions of his country that justify his filing after more than one year from arrival. He points to the October 12, 2002, Bali bombing which killed about 200 people and left 300 wounded; the Marriot Hotel Bombing in Jakarta on August 5, 2003, which killed about 13 people and wounded about 150; and documentary evidence in the form of the DOS Reports, news articles and his own testimony on the escalating discrimination, threats, and attacks against Christians.

The IJ however in its Decision of April 4, 2006, held that the foregoing do not fall under the "changed circumstances" exception and hence the asylum application which was filed outside the 1 year prescriptive period, was filed out of time.

On appeal, the BIA affirmed the Decision of the IJ holding that petitioner's asylum application was time barred and that he failed to meet his burden of proving that he qualified for an exception to the filing deadline.

On Petition for Review to the US Court of Appeals for the 4th Circuit, the Court held that it lacked jurisdiction to review the said determination pursuant to 8 USC § 11568(a)(3) [INA§208(a)(3)] which provides that "no court shall have jurisdiction to review any determination of the

Attorney General under paragraph (2)" citing *Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006).

In *Almuhtaseb v. Gonzales*, the 6th Circuit of the US Court of Appeals held that the court will review asylum applications denied for untimeliness only when the appeal seeks review of "constitutional claims or matters of statutory construction," not when the question is "discretionary" or "factual." In resolving the issue before it, the 6th Circuit relied on the statutory provisions of INA § 242(a)(2)(D) as amended by the REAL ID Act § 106(a)(1)(A)(iii) that "[n]othing . . . in any. . . provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims* or *questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." (emphasis supplied).

However, resolving a similar issue and construing the same provision of law, the 9th Circuit, has held that an alien's fact-specific challenge to the BIA's determination that he has not established "changed circumstances" or "extraordinary circumstances" does raise a "question[] of law". The term "questions of law" in INA § 242(a)(2)(D) [8 U.S.C. 1252(a)(2)(D)] "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan v. Gonzales*, 479 F.3d 646, (9th Cir. 2007). The Court of Appeals thus has jurisdiction to review the determination of the IJ or BIA on the timeliness of an asylum application where it would involve mixed questions of fact and law.

The issue of whether petitioner applicant has failed to show changed circumstances to excuse the untimely filing of an application for asylum is a mixed question of fact and law and falls squarely under the *Ramadan v. Gonzales* ruling of the 9th Circuit. It is thus error for the Court to have held that it had no jurisdiction to inquire into the determination made by the BIA.

The disagreement between the various circuits on this very important federal question warrants this Court's review so that it may finally be laid to rest with the adoption of the holding and reasoning of the Court of Appeals in *Ramadan v. Gonzales.*

2. The failure of the BIA to grant the asylum application of petitioner despite the latter having satisfied the standard of well founded fear of persecution calls for the exercise of this Court's supervisory power.

To be well founded, an asylum applicant's fear of persecution must be both subjectively genuine and objectively reasonable.

An applicant satisfies the subjective component by credibly testifying that he genuinely fears persecution. *Sael v. Ashcroft,* 386 F.3d 922 (9th Cir. 2004). Petitioner satisfied this with his credible and detailed testimony that he fears being hurt, killed and/or assaulted in Indonesia.

An asylum applicant generally satisfies the objective component in one of two ways: either by establishing that he

has suffered persecution in the past or by showing that he has a good reason to fear future persecution. *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004).

Petitioner has asserted that he is a Christian in a predominantly Muslim country. He openly lives and actively practices his religion which makes him a target of the Muslim extremists from whom he fears persecution.

Petitioner has shown that Muslim extremists in Indonesia seek to repress, punish, persecute and eradicate non-Muslims, especially Christians, through a pattern of intimidation, harassment and violence. Indonesian authorities condone such behavior because they cannot control the extremists. Not only that, Indonesian law discriminates against Christians.

Petitioner has testified that he and his family fear going to church because people throw rocks at the church during service; and even their church was bombed on Christmas eve of 2000 while the service was going on. He expressed fear of persecution because Christians in Indonesia like him and his family were and still are mistreated. He cited what happened to a friend who was mistreated.

Petitioner testified and presented documents showing the escalating violence being perpetrated by Muslim extremists against Christians. He testified on the Bali and Marrriott bombings in Indonesia and the simultaneous attack in three different cities in Indonesia on Christmas eve of 2000 during the church service. One of the churches that was bombed was the church where his parents were attending. He named his pastor who was persecuted in Indonesia. This pastor was stopped after church and he was put to jail. All these incidents

were reported to the police but they remained unsolved and nothing happened.

A well founded fear does not require certainty of persecution or even a probability of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003). Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear. *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004). An applicant for asylum has established a well founded fear if he shows that a reasonable person in his circumstances would fear persecution. Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

8 CFR §208.13(b)(2)(iii) also provides that the asylum applicant need not provide evidence that there is a reasonable possibility he would be singled out individually for persecution if: (A) he establishes that there is a pattern or practice in his country of nationality of persecution of a group of persons similarly situated to him on account of his religion; and (B) he establishes his own inclusion in, and identification with, such group of persons such that his fear of persecution upon return is reasonable.

That there is a pattern or practice of persecution of Christians in Indonesia has been established through petitioner's testimony, the DOS Reports and news articles submitted in evidence.

Petitioner has thus satisfied the standard of well founded fear of persecution on account of his religion.

Under these circumstances, and in accordance with the United Nations Convention and Protocol relating to the Status of Refugees to afford a generous standard for protection in cases of doubt, petitioner should be granted the relief of asylum.

CONCLUSION

WHEREFORE, it is respectfully prayed of the Honorable Court to grant the petition for a writ of certiorari.

Respectfully Submitted:

"S/"
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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GILBERT EMAN,
Petitioner,

v.

ERICH H. HOLDER Jr.,
United States Attorney General,
Respondent.

No. 07-2183

On Petition for Review of an Order of the
Board of Immigration Appeals
(A72-167-563)

Submitted: July 22, 2008

Decided: August 12, 2008

Before NIEMER, MOTZ, and TRAXLER,
Circuit Judges.

PER CURIAM:

Gilbert Eman, a native and citizen of Indonesia, seeks review of an order of the Board of Immigration appeals (Board) affirming the decision of the Immigration Judge denying relief from removal. In his petition for review, Eman first argues that the Board erred in finding that his asylum application was not timely filed and that no exceptions applied to excuse the untimeliness. We lack jurisdiction to review this determination pursuant to 8 U.S.C. § 1158(A)(3)(2006), even in light of the passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 stat. 231. See Almuhtaseb vs. Gonzales, 453 F.3d 743, 747-48 (6th Cir. 2006) (collecting cases).

Eman next challenges the Board's alternative finding that he failed to establish eligibility for asylum. To obtain reversal of a determination denying eligibility for relief, an alien "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." INS V. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). We have reviewed the record and conclude that Eman fails to show that the evidence compels a contrary result. Because Eman has not established eligibility for asylum, he cannot meet the more demanding standard for the relief of withholding of removal. See Chen v. INS, 195 F.3D 198, 205 (4th Cir. 1999).

Accordingly, we dismiss in part and deny in part the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DISMISSED IN PART
AND DENIED IN PART

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
JANUARY 20, 2009

No. 07-2183
A72-167-563

GILBERT EMAN,
Petitioner,

v.

MICHAEL B. MUKASEY
Attorney General of the United States,
Respondent,

ORDER

The Court denies the petition for rehearing.
Entered at the direction of the panel: Judge Niemeyer, Judge Motz, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

CLERK

STATUTORY PROVISIONS INVOLVED

Section 208(a) of the Immigration and Nationality Act (INA); [8 USC§1158(a)]

(a) Authority to Apply for Asylum.—

(1) *In general.*— Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port or arrival and including an alien who is brought to the United States after having been interdicted in international or United states waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions.—

(A) Safe third country.—Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien' life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney general finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit.—Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications. – Subject to subparagraph (D), paragraph (1) shall not apply to an alien if

the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances. – An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review.—No court shall have jurisdiction to review any determination of the Attorney general under paragraph (2).

Section 242(a)(2)(D) of the Immigration and Nationality Act (INA) [8 U.S.C. 1252(a)(2)(D)]

(D) *Judicial Review of Certain Legal Claims.*—Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

PROVISIONS OF THE CODE OF FEDERAL REGULATIONS INVOLVED

8 CFR § 208.4(a)(4)

(4) Changed circumstances.

The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death or attainment of age 21.

(ii) the applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

8 CFR § 208.13(b)(2)(iii)

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A)The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.